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IN THE

Supreme Court of the United States

October Term, 1969

No. 231

JOHN J. TYNE, JR.

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner respectfully prays that a writ of certiorari issue to review:

1. the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled cause on the 2nd day of April 1969, and
2. the Order of the same Court entered in the above-entitled cause on the 26th day of May 1969.

Opinion and Order Below

The reversing and remanding opinion in this case by the U.S. Court of Appeals for the Seventh Circuit (reported at 23 AFTR 2d, 69-1074) is appended hereto as Appendix A.

The prior reversing and remanding opinion in this case by the U.S. Court of Appeals for the Seventh Circuit (reported at 385 F.2d 40) is appended hereto as Appendix B.

The Order of May 26, 1969 in this case by the U.S. Court of Appeals for the Seventh Circuit is appended hereto as Appendix C.

The original memorandum Findings of Fact and Opinion of the Tax Court of the United States is reported at T.C. Memo 1966-214.

The second round of Decisions of the Tax Court of the United States (after the original reversal and remand by the U.S. Court of Appeals) is appended hereto as Appendix D and Appendix E.

Jurisdiction

The Judgment of the U.S. Court of Appeals for the Seventh Circuit was dated and entered April 2, 1969.

The Order of the U.S. Court of Appeals for the Seventh Circuit was dated and entered May 26, 1969.

There was no order respecting a rehearing or granting extension of time within which to petition for certiorari.

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code and Section 7482(a) of the Internal Revenue Code of 1954 [26 U.S.C. §7482(a)].

The jurisdiction of the Court of Appeals is found in Section 1254(1) of Title 28 of the United States Code and Section 7482(a) of the Internal Revenue Code of 1954 [26 U.S.C. §7482(a)].

The jurisdiction of the Tax Court of the United States is found in Section 7442 of the Internal Revenue Code of 1954 [26 U.S.C. §7442].

Questions Presented

1. Can taxpayer deduct as an ordinary and necessary business expense all of the expenses necessitated by vehicular transportation of his trade tools, which tools could not be readily carried by taxpayer, to his place of employment in a case where it may be found that taxpayer would have driven to and from work had it not been necessary to transport his tools?

2. Is it constitutional for the Commissioner to enforce an assessment against taxpayer based on a Tax Court decision after the Tax Court decision was reversed by the U.S. Court of Appeals for the Seventh Circuit in a case where taxpayer did not file a bond to stay assessment? Stated differently, can the Tax Court and the Commissioner singly (or in tandem) pick and choose which decisions of the U.S. Courts of Appeal they will obey? Are seizures by the Commissioner enforcing assessments based on an already reversed Tax Court decision unreasonable and a taking of property without due process?

3. Is it constitutional, in any case, for the Commissioner to levy against 100% of taxpayer's net weekly pay—with taxpayer receiving not even 1 cent of the pay he has earned —in the instant case this procedure having been effectuated against taxpayer for a continuous period of eight weeks in the summer of 1968?

Statute Involved

Internal Revenue Code of 1954

Section 162. TRADE OR BUSINESS EXPENSES.

(a) In General.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

Amendments to the Constitution of the United States

4th AMENDMENT. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

5th AMENDMENT. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

13th AMENDMENT. Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall

exist within the United States, or any place subject to their jurisidiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Statement of the Case

This case involves Federal Income Taxes for the years 1957, 1958 and 1960.

During the years involved, taxpayer was employed as an apprentice operating engineer by several companies involved in heavy construction and road-building work. Taxpayer transported approximately 200 pounds of his trade tools which were essential in fulfilling his job requirements in his automobile and truck to his place of employment. He never left his tools at job sites overnight for fear the tools might be stolen.

No determination of taxpayer's mental processes or stability has been made and it has not as yet been determined whether taxpayer would or would not have driven to any job site absent the necessity of vehicular transportation of his trade tools which were essential in fulfilling his job requirements.*

Taxpayer was also required to have his vehicle on the job (in addition to his trade tools) because he had on-the-job daily travel requirements which varied from short distances to distances in excess of five miles.

On the first Tax Court hearing, the Tax Court allowed 20% of the expenses as being attributable to on-the-job re-

*The exact and undisputed expenses involved herein are as follows: In 1957 taxpayer incurred automobile expenses of $1,328.04. In 1958 he incurred automobile and truck expenses of $1,377.61, insurance expenses on the truck of $133.25, and depreciation on the truck of $370.80, for a total of $1,881.66. In 1960 he incurred automobile and truck expenses of $569.63 as well as depreciation on the truck of $370.80, for a total of $940.43.

quirements and disallowed the balance of taxpayer's business expenses. The Tax Court offered no explanation or rationale of its random selection of 20%.

On the first appeal of this case, the Court of Appeals for the Seventh Circuit reversed the Tax Court judgment and remanded with two instructions:

1) to allow 100% of taxpayer's driving expenses if the taxpayer would not have driven to work but for the necessity of bringing his trade tools with him.

2) if it were to be found as a fact that taxpayer would have driven to and from work had it not been necessary to transport his tools, he ought to be allowed to deduct that portion of his reasonable driving expense which is allocable to the transportation of tools. If it were to be found that taxpayer fell within this second category, the Court of Appeals for the Seventh Circuit assigned the burden to the Commissioner of Internal Revenue to devise a reasonable basis for allocating expenses between the driver of the vehicle and the cargo of the vehicle.

Taxpayer then moved for a Tax Court trial, but the motion was denied. The Tax Court then entered the second round of decisions in conformity with the Commissioner's figures. The Commissioner had merely picked a figure of 50% out of the air and applied that percentage to the balance of taxpayer's business expenses which previously had not been allowed by the Tax Court as a deduction. The Commissioner did not state, nor attempt to explain, why his random 50% figure should be used.

The Commissioner having thus, in effect, admitted and proven his inability to devise a reasonable basis for allocating between the driver of the vehicle and the cargo of the vehicle, taxpayer took a second appeal to the U.S. Court of Appeals for the Seventh Circuit which, of course, reversed the second round of Tax Court decisions. But the recent reversal is merely an invitation to go back to the

Tax Court for a third round of decisions, have the Tax Court pick a figure of 51%—then back to the U.S. Court of Appeals for another reversal—then back to the Tax Court the fourth time for 52%—then another reversal, etc., etc. Taxpayer might not live long enough to get the deduction set at its proper 100%.*

If the foregoing were not conclusive on the matter, we are constrained to emphasize that the Commissioner admitted the correctness of taxpayer's position herein. (Appendix F and Appendix G).

Meanwhile, back at his Collection Division, the Commissioner was occupying himself gainfully by enforcing assessments based on Tax Court decisions which had already been reversed by the first decision of the U.S. Court of Appeals for the Seventh Circuit.

The first Tax Court decisions were entered January 18, 1967 and reversed by the Seventh Circuit on November 7, 1967. On entering its second round of Tax Court decisions on March 28, 1968 the Tax Court did not vacate the 1967 Tax Court decisions which had been reversed by the Seventh Circuit.

Thereafter the Commissioner served a Notice of Levy on taxpayer's employer on June 12, 1968 based on assessments enforcing the reversed Tax Court decisions. Taxpayer did not file a bond to stay assessment of deficiencies determined by the Tax Court in its reversed decisions of January 18, 1967.

As a result of the Commissioner's seizures, taxpayer received not so much as 1 cent of the pay he earned—the

*The Commissioner's random selection of 50% results in a mere 60% allowance of expenses . . . the Tax Court's original, unreasoned 20% random selection plus the Commissioner's random and unreasoned 50% applied to the 80% remaining after the Tax Court's random selection of 20%. 100% of taxpayer's earnings were taxed, however.

period of total deprivation spanning the entire period June 13, 1968 to and including August 13, 1968.

On or about April 21, 1969 taxpayer, by Counsel, filed a MOTION FOR ORDER TO ENFORCE MANDATES OF THIS COURT in the U.S. Court of Appeals For The Seventh Circuit to correct the actions of the Commissioner and for an order vacating, nunc pro tunc, the reversed Tax Court decisions of January 18, 1967. On May 26, 1969 the motion was denied by the Court and it is this Order of May 26, 1969 (Appendix C) for which taxpayer also petitions for certiorari.

Argument

A. Reasons Relied On For The Allowance of the Writ:

1. The Seventh Circuit Court of Appeals has rendered a decision in this case in conflict with the decision of the Court of Appeals for the Ninth Circuit on the same matter in *Crowther* v. *Commissioner of Internal Revenue,* 269F.2d 292.

2. The Seventh Circuit Court of Appeals has rendered a decision in this case in conflict with the decision of the Court of Appeals for the Second Circuit on the same matter in *Sullivan* v. *Commissioner of Internal Revenue,* 368 F.2d 1007—which, in turn, is in conflict with the Ninth Circuit decision in *Crowther* v. *Commissioner of Internal Revenue,* 269 F.2d 292. A petition for certiorari was filed with this Court on or about June 4, 1969 by Sullivan and bears Number 1480—October Term, 1969.

3. The question raised before the Seventh Circuit in this case concerning the efficacy of a Court of Appeals reversal (and, by extension, an opinion of the Supreme Court of the United States) is novel. Taxpayer adheres to the principle that Appellate Courts must be obeyed by all

concerned and that when an Appellate Court reverses an inferior Court's decision, the reversal does not depend on the acquiescence of the party adversely affected by the reversal.

4. The question raised before the Seventh Circuit Court of Appeals concerning seizures by the Commissioner and total deprivation of all of taxpayer's earnings for a continuous two-month period is novel. Taxpayer adheres to the principle that such seizure and deprivation is prohibited by the 4th and 13th Amendments to the Constitution of the United States. Even in the days of "official" slavery, the slaves were permitted food and drink, it being recognized by the slave masters that total deprivation of food and/or drink for a continuous two-month period might have an adverse effect on the health of the slaves thus deprived. Whether taxpayer's position be termed slavery, involuntary servitude or peonage, the result is the same. The seizures are unreasonable and they are devastating. Taxpayer respectfully requests the protection of the Supreme Court of the United States.

B. As To The Merits — Trade Or Business Expenses Are Deductible.

The decisions of the Second, Seventh and Ninth Circuits are consistent and correct on the point that a taxpayer may deduct 100% of the expenses of necessary vehicular transportation of his trade tools in a case where taxpayer would not travel to his place of employment without his trade tools.

The three Circuits are in disagreement, however, on the question of allocation and the possibility of splitting an indivisible expense into parts.

The Second Circuit (in *Sullivan*) is in conflict with the Ninth Circuit (in *Crowther*). The Ninth Circuit rejected the Tax Court finding that Crowther's expenses *are di-*

visible into (1) personal expenses of "commuting" to his work and (2) business expenses of transporting tools and equipment used by him in his employment.

Similarly the Seventh Circuit (in *Tyne*) is in conflict with the Ninth Circuit (in *Crowther*) which rejected the theory that an indivisible expense can be divided.

So too, the Seventh Circuit (in *Tyne*) is in conflict with the Second Circuit (in *Sullivan*). The Second Circuit approved the Tax Court's arbitrary and unreasoned "allocation" of one-third of taxpayer's employee business expense as being deductible. The Seventh Circuit (in *Tyne*) rejected the Commissioner's random unreasoned selection of 50%.

The Seventh Circuit, in its first mandate (Appendix B), specifically assigned the burden of making a reasonable allocation to the Commissioner of Internal Revenue. The Commissioner, on the Tyne remand, could not figure out how to devise a formula for allocation between the driver of the vehicle and the cargo of the vehicle. The Commissioner merely picked a figure of 50% out of the air and applied that figure to the 80% disallowance the Tax Court originally picked out of the air. On the second appeal, the Seventh Circuit knew that something was wrong and reversed the second round of unreasoned Tax Court decisions. The Commissioner still has the burden of determining a reasonable allocation in the Tyne case but the Commissioner has previously demonstrated that he cannot do an impossible thing... to wit, splitting into parts that which is indivisible.

1. The confusion surrounding the percentage-of-deductibility question is caused by not realizing that the "2 elements" present (if it were possible to split the matter) are both business and inextricably intertwined and non-separable. The taxpayer-driver is performing a business function in driving his business vehicle containing his business trade tools, which tools were essential in fulfilling

his job requirements. It is clear that without his tools he could not work and it follows: no driver—no vehicle; no vehicle—no tools; no tools—no work; no work—no pay; no pay—no income; no income—no income tax.

2. This whole case is specifically governed by the wording of the Statute involved. In 1921 Congress affirmatively declared its will and amended the predecessor of I.R.C. §162(a) by inserting the word "ALL" in the statute. The word "ALL" means 100% and the statute (re-enacted many times in Revenue Acts and Codes since Congress stated its will in 1921) still reads as follows:

Internal Revenue Code of 1954:

Sec. 162. Trade Or Business Expenses.—

(a) IN GENERAL. — There shall be allowed as a deduction ALL the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business

Emphasis has been supplied in quoting the statute to make clear that the word "ALL" inserted in the statute did not find its way into the statute except by specific design and purpose by Congress.

C. As To The Merits — Must Inferior Courts Obey Appellate Court Mandates?

The first round of Tax Court decisions was reversed by the U.S. Court of Appeals for the Seventh Circuit. The Tax Court did not vacate the reversed decisions and, after the Seventh Circuit's reversal, the Commissioner enforced the reversed first round of Tax Court decisions by seizing all of taxpayer's net earnings over the period June 13, 1968 to and including August 13, 1968. This total seizure amounted to $2,020.22.

The Tax Court then entered a second round of decisions which, of course, was reversed by the Seventh Circuit.

Thereafter taxpayer, on or about April 21, 1969, filed a MOTION FOR ORDER TO ENFORCE MANDATES OF THIS COURT with the U.S. Court of Appeals for the Seventh Circuit requesting that the Tax Court be compelled to vacate all judgments reversed by the Seventh Circuit and requested also that the Commissioner be compelled to return forthwith all monies seized by the Commissioner in enforcing the first round of reversed Tax Court decisions. Taxpayer's Motion was denied by the Seventh Circuit in its Order dated May 26, 1969 (Appendix C).

Thus we have a situation where the first round of reversed Tax Court decisions is not vacated—and later is enforced by collection of $2,020.22. We also have the second round of reversed Tax Court decisions which has not been vacated and need not be if the May 26, 1969 Order of the Seventh Circuit remains undisturbed. Thus the Commissioner is free to enforce the second round of reversed Tax Court decisions, assess and collect an additional $1,800. This can continue through the next 10 Tax Court decisions and reversals... the third round collections at the rate of $1,700. Each succeeding collection being at an assumed $100 reduction, total collections can amount to more than $16,000 without any hope of taxpayer regaining any of his seized property as a matter of right.

Thus the Commissioner and the Tax Court need never concern themselves about reversals of Tax Court decisions —if reversals do not have any effect. Whatever the Tax Court wants will be enforced because the Tax Court will decide which reversals are effective and which reversals it will set aside (by inaction).

If mandates of the U.S. Court of Appeals are so easily avoided by the Commissioner and the Tax Court, is any person, group or entity in our Nation obliged to pay any attention to any of the Courts in our Nation? Or is each of us free to over-ride court-orders by the simple expedient of ignoring it and doing what we please in the situation? This is the practical effect of the May 26, 1969 Order of the Seventh Circuit.

To be sure, the Commissioner has issued an expression of piety in connection with the seizures and setting aside of the mandate of the Seventh Circuit. Does this mean (by extension) that murderers can avoid the consequences of their deeds if they promise not to disturb the cadaver after they are apprehended?

.It is clear that a reversal of a Tax Court decision by the U.S. Court of Appeals is self-executing. Upon entry of the reversal, the Tax Court decisions are reversed and nonexistant. Taxpayer and the Commissioner are in exactly the same position they were in before the Tax Court heard the case originally. As of the moment of entry of reversal by the U.S. Court of Appeals, there is no deficiency due from taxpayer. The reversal by the U.S. Court of Appeals does not depend for its efficacy on the acquiescence or ministerial act of either the Tax Court or the Commissioner.

Upon reversal, there no longer exists any "deficiency". The deficiency having been voided, any assessment based on the voided deficiency is also voided. And without an assessment, there can be no valid seizure of taxpayer's property.

The Commissioner's seizures of taxpayer's property thusly is prohibited by the 4th and 5th Amendments to the Constitution of the United States. Similarly, future seizures of taxpayer's property based on reversed Tax Court decisions are also prohibited by the same 4th and 5th Amendments.

D. As To The Merits — Is Total Deprivation of Taxpayer's Earnings Prohibited by the 4th and 13th Amendments To the Constitution of the United States?

The Commissioner levied against taxpayer's wages and required the employer to withhold from taxpayer and remit to the Commissioner 100% of taxpayer's net pay. Taxpayer thus received not so much as 1 cent of the pay he earned—the period of total deprivation spanning the entire

period June 13, 1968 to and including August 13, 1968. Even if the entire alleged debt was owed, and the Commissioner conceded that it was not, a seizure of 100% of a man's wages is clearly prohibited by the Constitution. It matters not whether the taxpayer's situation be termed slavery, involuntary servitude, or peonage—the result is the same and the result is devastating. Unless a man receives food and drink during such a period of total deprivation, he will die. Is death now to be an approved penalty for defending one's self in a tax dispute with the Commissioner? Even the slave masters had more sense than to deprive their charges of food or drink for any long period of time.

A levy of 100% is clearly unconstitutional. No levy may exceed the percentages and procedures set by the legislators of the state or territory where the levy is made. Human life and dignity must be preserved.

Conclusion

For all the foregoing reasons, petitioner respectfully prays this Court grant a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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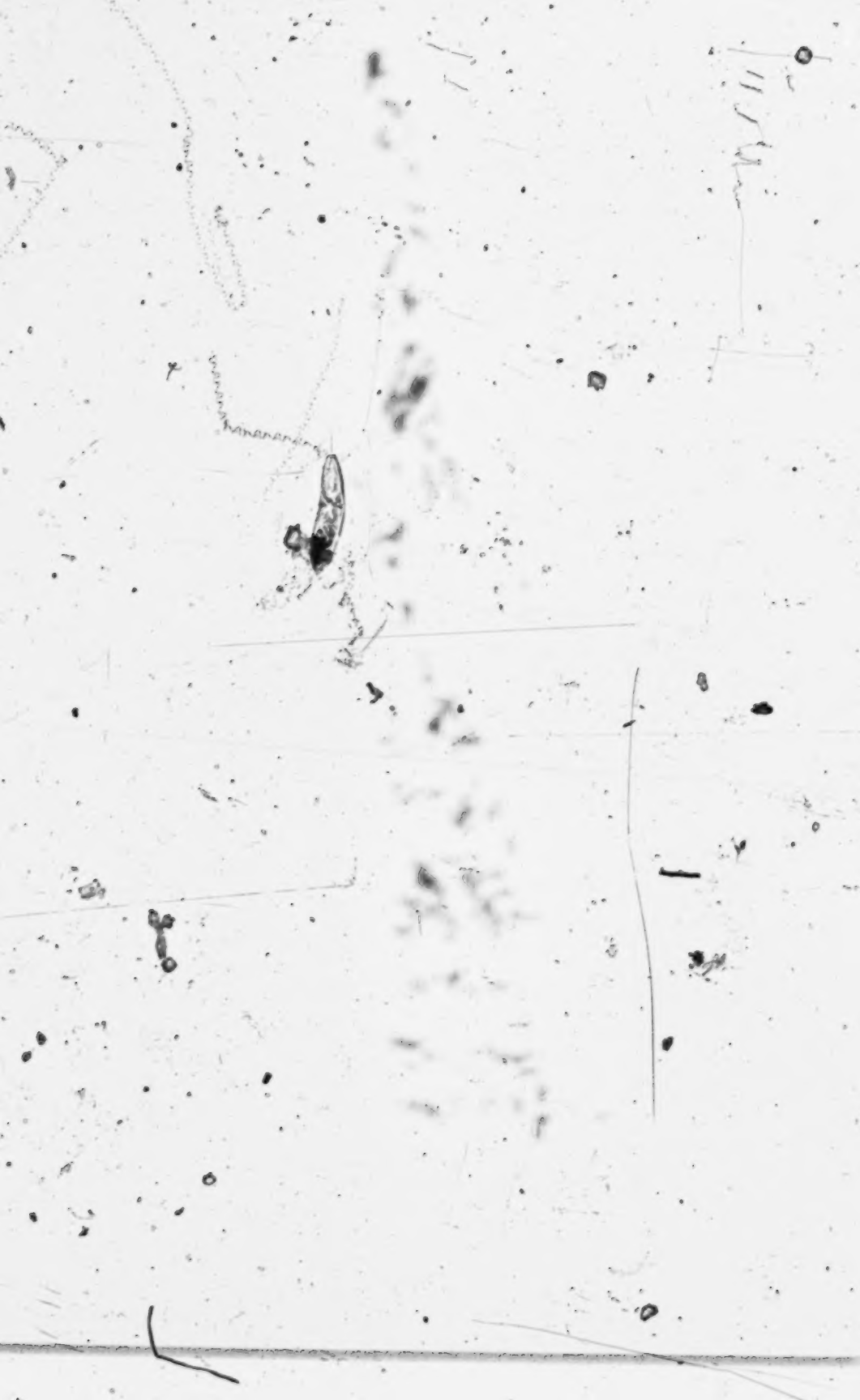
APPENDIX



APPENDIX A

Cite as 23 AFTR 2d, 69-1074

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1968 — SEPTEMBER SESSION, 1968

No. 16945
JOHN J. TYNE, JR., *Petitioner,*
v.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On petition for review of decision of the Tax Court of the United States.

APRIL 2, 1969

Before KNOCH, *Senior Circuit Judge,* KILEY and FAIRCHILD, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* This is a sequel to *Tyne* v. *C.I.R.* (7th Cir. 1967), 385 F.2d 40. We shall not repeat what was written there.

The judgment then entered and incorporated into our mandate to the tax court, read as follows: "that the decisions of the Tax Court of the United States entered in this cause on January 18, 1967, be, and the same are hereby, REVERSED, and that this cause be, and it is hereby, REMANDED to the Tax Court of the United States with instructions to the Commissioner to determine the allocation of the proportion of driving expenses which is

a reasonable cost of doing business under Section 162, in accordance with the opinion of this Court filed this day."

The commissioner determined that 50% of the portion of driving expense not already allowed by the tax court for on-the-job travel was deductible, and presented computations reflecting that allocation. Tyne moved for trial, but the tax court denied the motion, taking the position that our mandate required no hearing.[1] The tax court entered decisions in conformity with the commissioner's figures.

I.

If the taxpayer, Mr. Tyne, really contends that he could at trial, show that the commissioner's 50% allocation of expense between the two purposes (transportation of tools and personal transportation) is unreasonable, we would have little difficulty in deciding that the tax court must afford him the opportunity. The 1967 mandate can not be construed as compelling the tax court to abdicate its responsibilities and accept the commssioner's decision as its own.

It is not clear from the briefs that Mr. Tyne seeks this opportunity. But we make it clear that he has such right on remand if he falls short of success under point III, below.

II.

Tyne asks us to reconsider part of our 1967 decision. He contends, as he did then, in substance, that where it is necessary that an employee transport his trade tools to and

[1] The presiding judge said, "The mandate does not require a new hearing. The mandate is one of the strangest I have seen arrive here from a Court of Appeals in that it imposes no duty on the Tax Court whatsoever, but does impose on the Commissioner the duty to make an allocation.

"Now, to my way of thinking, if the Commissioner has made an allocation he has complied with the order of the Court Appeals and until I receive some further direction from the Court of Appeals I will so treat it."

from work by automobile, his expenses for doing so are 100% deductible whether or not he would have driven to and from work in the absence of such necessity.

It is plain that his contention was considered and rejected in the 1967 decision. He did not seek rehearing then, and we decline to grant one now.

III.

Tyne asserts that in fact he would not have used his automobile to drive to and from work in the years in question but for the necessity of transporting his tools. He contends, accordingly, that the expenses so incurred are 100% deductible.[2]

The tax court made no finding in its first decision (nor its second) with respect to the so-called primary purpose, or "but for", issue.

It is arguable that the reference in our 1967 judgment to the retermination of an allocation implied that we had determined either (1) that the record precluded a finding favorable to Tyne on the "but for" issue or (2) that we had rejected the proposition of law, upheld in the second circuit in *Sullivan,* that if a taxpayer can prevail on the "but for" issue, he may deduct 100% of the expenses.

Neither (1) nor (2) is explicit in the 1967 opinion. Had we intended to reject what was referred to as "The first holding in the Second Circuit's *Sullivan* decision," the opinion would surely have made that evident.

The commissioner's brief, on the 1967 review, said, "In conclusion, the taxpayer is entitled to a deduction only if he can show that his transportation expenses were occasioned primarily by the necessity for transporting tools. But since the Tax Court's rationale foreclosed taxpayer from making that showing, the case should be remanded."

[2] *Sullivan* v. *Commissioner,* (2d Cir. 1966); 368 F.2d 1007; Rev. Rule 63-100 (1963-1), Cum. Bull. 34.

If we intended to grant taxpayer less of an opportunity in that direction than the commissioner conceded, we would probably have said so.

The commissioner's brief on the instant review says, "If, however, this Court in 385 F.2d 40, did not intend to foreclose applicability of the 'but for' rule in an appropriate situation, then it would appear that this case should be remanded for a factual determination by the Tax Court whether the taxpayer comes under the 'but for' rule so as to be entitled to a full deduction for the claimed expenses."

We conclude that the 1967 mandate did not limit the tax court to determining an appropriate allocation after consideration of the determination made by the commissioner.

Tyne should have been given, and must now on remand be given, an opportunity to establish that he would not have used his automobile to drive to and from work in the years in question but for the necessity of transporting his tools. If he succeeds, he will be entitled to deduct 100% of the expenses in question.

The decisions appealed from are reversed, and the cause remanded for further proceedings consistent with this opinion.

APPENDIX B

Cite as 385 F.2d 40

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 16251 SEPTEMBER TERM AND SESSION 1967

JOHN J. TYNE, JR.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of Decision of the Tax Court of the United States.

November 7, 1967

Before DUFFY, *Senior Circuit Judge,* FAIRCHILD and CUMMINGS, *Circuit Judges.*

DUFFY, *Senior Circuit Judge.* This is a petition by taxpayer to review a decision of the Tax Court. The question at issue is whether the taxpayer can deduct as an ordinary and necessary business expense, within the meaning of Section 162, Internal Revenue Code of 1954, the cost of transporting his trade tools in his automobile and truck to his place of employment. The taxpayer claims the deduction in the taxable years 1957, 1958 and 1960. It is undisputed that he transported approximately 200 pounds of tools which were essential in fulfilling his job requirements.

During 1957, 1958 and 1960, petitioner was employed by several companies involved in heavy construction and road-building work. Taxpayer was an apprentice operating en-

gineer. Although petitioner worked principally as a machine oiler, he, at times, worked as a machine operator and as a pump operator. He never left his tools at job sites over night for fear the tools might be stolen. Petitioner's on-the-job daily travel requirements varied from short distances to distances in excess of five miles.

On his income tax return for the taxable years in question, petitioner claimed, as a business deduction, 100% of his automobile and truck expenses, including depreciation of his truck in 1958 and 1960.

The Tax Court allowed 20% of the claimed expenses as being attributable to on-the-job requirements. It disallowed the balance by finding that since the taxpayer was a commuter while using his automobile to get to work on each of the days involved, the transportation expenses involved constituted in toto non-deductible expenses. The Tax Court relied upon its prior decision in *Sullivan* v. *Commissioner, 45 T.C.* 217 (1965).[1]

The Commissioner of Internal Revenue contends that the Tax Court applied an erroneous legal test in this case. The Commissioner argues that the deduction of transportation expense which serves a dual purpose, one, commuting and two, business such as transportation of tools, should depend on which purpose is primary. The Commissioner argues for the rule that such dual purpose transportation expenses can be deducted only upon a showing that they were occasioned primarily by the necessity to transport the taxpayer's tools.

It is, of course, well established that commuting expenses—the cost of traveling to and from home to an established place of business—are non-deductible personal expenses. *Commissioner* v. *Flowers,* 326 U.S. 465.

[1]The decision of the Tax Court in *Sullivan* was reversed by the United States Court of Appeals for the Second Circuit. *Sullivan* v. *Commissioner,* 2 Cir. (1966), 368 F.2d 1007.

The difficulty arises when there is a dual personal-business purpose for the expenditure. When that occurs, the Commissioner has ruled that a deduction will be allowed only if the expenditure is incurred primarily for a Section 162 business purpose.

To illustrate, the Commissioner has ruled in Rev. Rule 63-100 (1963-1) CUM. Bull. 34, that a musician may deduct the cost of using his car to transport his musical instruments between home and the business only if the expense is occasioned primarily by business necessity.

On the other hand, petitioner contends that 100% of his expense should be deductible because his job required him to have his tools with him daily. Since the tools were on the job only because taxpayer incurred automobile and truck expense to transport them, the expense ought to be deductible. Taxpayer's argument goes too far since it would impliedly overrule *Commissioner* v. *Flowers, supra.*

In *Sullivan* v. *Commissioner, supra,* the Court of Appeals recognized the dual purpose in incurring transportation expenses in a case such as ours. However, it rejected the test urged by the Commissioner and also that urged by the taxpayer. It chose to apply what has been called the allocation rule.[2] The Court stated at page 1008, "Even if taxpayer would have driven to and from work had it not been necessary to transport his tools, he ought to be allowed to deduct that portion of his reasonable driving expenses which is allocable to the transportation of tools." If storage were feasible, he would only be allowed to deduct its cost.

Both parties to the case at bar strongly urge that the allocation rule should not be followed; that it would require difficult *ad hoc* allocations between transportation expenses

[2] The first holding of the Second Circuit's *Sullivan* decision was that the taxpayer may deduct 100% of his reasonable driving expenses if the taxpayer would not have driven his automobile to work but for the necessity of bringing his tools with him.

attributable to carrying the taxpayer's person and the transportation of the tools of his trade. The Commissioner urges the practical impossibility of implementing the allocation test laid down in the *Sullivan* case.

It seems clear to us that a taxpayer should not be permitted to evade the Commuter Rule by throwing a hammer, wrench and a screwdriver into his automobile as he drives to work. Yet, if the taxpayer is required by his type of work to bring with him daily, tools of such size and weight that they cannot be readily carried by the taxpayer, we agree with the Second Circuit Court of Appeals in *Sullivan*— "Even if taxpayer would have driven to and from work had it not been necessary to transport his tools, he ought to be allowed to deduct that portion of his reasonable driving expense which is allocable to the transportation of tools."

Granted such allocations cannot be made with a mathematical nicety. However, we doubt the argument of both the Commissioner and taxpayer that it is practically impossible to make such an allocation. It seems to us that such an allocation should not be more difficult than decisions with reference to musicians taking musical instruments to their work in automobiles. We think such a rule will operate more fairly than putting the burden on a taxpayer to prove what the Commissioner might decide is the primary purpose of the transportation of tools by a taxpayer.

The allocation rule was first adopted by the Tax Court. *Charles Crowther,* 28 T.C. 1293 (1957), rev'd on another ground, 269 F.2d 292 (9 Cir., 1959); *Francis Eaton,* 17 T.C.M. 60 (1958). In *Sullivan* v. *Commissioner,* 45 T.C. 217 (1965), the Tax Court reversed itself, but the Second Circuit reversed the Tax Court, 368 F.2d 1007, and reinstated the old allocation rule.

The judgment of the Tax Court is reversed and remanded with instructions to the Commissioner to determine the allocation of the proportion of driving expenses which is a reasonable cost of doing business under Section 162.

REVERSED and REMANDED.

FAIRCHILD, *Circuit Judge (concurring in part, dissenting in part)*. The tax court did not make findings whether or not it was necessary for petitioner to have the 200 pound assortment of tools on the job, whether or not it was necessary to transport them daily, because of inadequancy of storage facilities, nor whether or not petitioner would have used his car but for the need to transport tools.[1] The tax court considered all these factual issues immaterial, because it deemed the expense was nondeductible commuting expense even if all such issues were decided in favor of petitioner. The commissioner concedes this is an erroneous view.

I concur with the majority in rejecting the view of the tax court and remanding the matter for further proceedings. I would, however, attempt to state a principle for the tax court to follow in making its determination on remand, assuming that it finds as a fact the necessity of transporting the tools by car to and from the job sites.

The majority indicates that some portion of the expense attributable to driving to and from work can be "allocated" to the business purpose (necessary transportation of tools) and the balance "allocated" to the personal purpose (transportation of petitioner), the former portion being deductible. Upon what reasonable basis can portions of the expense of such indivisible trips be "allocated" to the two purposes being served at the same time and on each trip? None has been suggested, and such seemingly logical

[1] The tax court did find that public transportation was available for commuting to some of the job sites.

possibilities as allocation according to the relative weight of petitioner and his tools seem unimpressive.

The commissioner's view and the view of the second circuit each requires a determination whether a taxpayer would have used his car for travel to and from work but for the necessity of carrying tools. Such inquiry in all but the rarest cases will necessarily be speculative, and into a subjective area. Where it is determined that the taxpayer would have used less expensive means of transportation but for his need to carry equipment, I see no logical reason for permitting him to deduct the entire expense, because he would have spent part of it for his personal, commuter purposes anyway. Where less expensive means were adequate and available, I would give the taxpayer the benefit of the doubt and assume he would have used them, but allow him to deduct only the difference.

I suggest the following phrasing of the principle:

A taxpayer who is reasonably required, because of the need for transporting tools or other equipment to and from his work, to use means of transportation which are more expensive than other available and reasonably adequate means of personal transportation, may deduct the difference between the expense incurred for transportation by the means actually used and the expense he would have incurred if he had used the less expensive means of transportation.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

May 26, 1969

Before

Hon. WIN G. KNOCH, *Senior Circiut Judge*

Hon. ROGER J. KILEY, *Circuit Judge*

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

No. 16945

JOHN J. TYNE, JR., *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition for Review of Decision of the Tax Court of the United States.

ORDER

Peitioner John J. Tyne, Jr., by counsel, has filed a "Motion for Order to Enforce Mandates of This Court." He claims that the tax court and the commissioner have failed to respond adequately to decisions of this court.

The tax court rendered decisions determining certain income tax deficiencies on the part of petitioner January 18, 1967. Although petitioner sought review in this court, he did not file a bond to stay assessment. The commissioner, on May 25, 1967, made assessments for 1957 and 1958. On November 7, 1967, we reversed the tax court decisions and remanded for further proceedings.

Although it is arguable logic that the reversal of the decisions which were the foundations of the assessments compelled abatement, we consider it a better construction of 26 U.S.C. §7486 that reversal with remand for further

proceedings, as distinguished from reversal and final disallowance of defiiciencies, did not require abatement until action of the tax court upon remand. On March 28, 1968, the tax court made decisions on remand which did decrease the deficiencies. We think that corresponding abatement of the assessment was required at that time, but the commissioner failed to order it.

From June to August, 1968, the commissioner made a series of seizures and collected the full amount assessed. On April 2, 1969 we reversed the March 28 decision of the tax court, again remanding for further proceedings. Consistent with the view above expressed, abatement of the remaining portion of the assessments was not then required, but will depend upon further decision by the tax court.

The commissioner now belatedly takes the position that "we are abating the assessments made in these cases to the extent they exceed the amounts determined by the Tax Court in its decisions of March 28, 1968. The petitioner will, therefore, be receiving a refund for the amounts collected, equal to these abatements, together with interest." Further abatement and refund will depend upon further decision by the tax court.

In reliance upon the representations made by the commissioner and above quoted, we conclude that no mandatory relief is required at this time.

Accordingly,

IT IS ORDERED that petitioner's motion is denied.

APPENDIX D

TAX COURT OF THE UNITED STATES

JOHN J. TYNE, JR.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 233-62

DECISION

Pursuant to the opinion and mandate of the United States Court of Appeals for the Seventh Circuit, the respondent has made an allocation of the proportion of driving expenses as directed by the Court of Appeals, which is included in the computation of tax liability filed by the respondent on March 27, 1968; and incorporating herein the facts recited in respondent's computation, it is

ORDERED AND DECIDED: That there are deficiencies in income tax due from the petitioner for the taxable years 1957 and 1958 in the amounts of $238.57 and $731.21, respectively.

(Signed) G. G. WITHEY
Judge.

Entered: March 28, 1968

APPENDIX E

TAX COURT OF THE UNITED STATES

JOHN J. TYNE, JR.,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
Docket No. 2788-62

DECISION

Pursuant to the opinion and mandate of the United States Court of Appeals for the Seventh Circuit, the respondent has made an allocation of the proportion of driving expenses as directed by the Court of Appeals, which is included in the computation of tax liability filed by the respondent on March 27, 1968; and incorporating herein the facts recited in respondent's computation, it is

ORDERED AND DECIDED: That there is a statutory deficiency in income tax due from the petitioner for the taxable year 1960 in the amount of $220.36, and that there is an overpayment of income tax for the taxable year 1960 in the amount of $253.05, which amount was paid on April 15, 1961, and for which amount a claim for refund could have been filed under the provision of section 6511(d)(2) of the Internal Revenue Code of 1954, on May 4, 1962, the date of the mailing of the notice of deficiency.

(Signed) G. G. WITHEY
Judge.

Entered: March 28, 1968

APPENDIX F

Excerpt from the Memorandum for the Respondent in *Jonn J. Tyne, Jr.* v. *Commissioner of Internal Revenue*, 385 F.2d 40, in the United States Court of Appeals for the Seventh Circuit, pages 6-7.

It is respectfully submitted that the allocation rule should not be followed. It appears to be at variance with the general approach taken throughout the transportation expense area and with Rev. Rul. 63-100. Moreover, the allocation rule would require difficult *ad hoc* allocations between transportation expenses attributable to carrying the taxpayer's person and transportation of the tools of his trade. See, in this respect, the instant taxpayer's discussion (Br. 12-15) concerning the practical impossibility of implementing the allocation test laid down by the Second Circuit in *Sullivan* v. *Commissioner*, 368 F.2d 1007. Finally, if the amount of the transportation expense is the same regardless of whether it is occasioned by personal reasons, by business reasons or by both, allocation would seem to be impractical.

APPENDIX G

Petitioner's Discussion In His Brief (Pages 12-15) in *John J. Tyne, Jr.* v. *Commissioner of Internal Revenue*, 385 F.2d 40, in the United States Court of Appeals for the Seventh Circuit — Referred to by Respondent in Excerpt set forth as Appendix F herein.

While the decision of the Court of Appeals in *Sullivan* correctly rejected the transformation theory of the Tax Court in that case, nevertheless it is submitted that portions of the Second Circuit's decision are breeding grounds for ceaseless rounds of litigation, including the instant case. After setting forth the rule in a case where a taxpayer would not have driven but for the necessity of transporting his tools, the Court continued

> "But we hold that the deductibility of expenses of transporting tools to and from work should not be so narrowly limited. Even if taxpayer would have driven to and from work had it not been necessary to transport his tools, he ought to be allowed to deduct that portion of his reasonable driving expenses which is allocable to the transportation of tools."

It is this last part of the quotation which is, at best troublesome and unclear. It is respectfully submitted that petitioner has not the slightest idea, not even the slightest understanding how such allocation should, could or would be feasible. And petitioner is convinced that such allocation is nothing short of impossible.

The hopelessness of the theory of allocation is made clear by asking what petitioner views as an exasperating question. If the allocation theory survives, what criteria must be used by the Tax Court in determining how such allocation shall be made? This vital question should have an understandable answer. Petitioner believes the question cannot be answered intelligently and definitively.

The confusion surrounding allocation is caused by not differentiating between cases such as the instant one where "2 elements" (if it were possible to split the matter) are both business and other cases where 2 elements are clearly present and diverse.

The instant case is not at all similar to the substance of Rev. Rul. 56-168* where allocation rules are set forth covering cases where the expense of personal vacations, entertainment and other recreation are added on to expeditures made for business purposes. Certainly such personal vacations, entertainment and recreation are nondeductible under Section 262 of the Internal Revenue Code.

It is equally clear that no allocation can be called for in the instant case. The circumstance of a man bringing tools to work so that he can earn wages is not even vaguely similar to circumstances involving additional expenses of personal vacations, junkets or high living. The act of driving tools to work is an integral part of the process of being able to earn wages, and in fact there is not more than one element here present and that single element is an entirely business one.

It is respectfully submitted to this Court that the confusion about allocation should be set to rest and the rule concerning tool transportation clearly defined, possibly in the following language:

> "Even if transportation of his trade tools is not the only reason for driving to and from work, petitioner ought to be allowed to deduct his reasonable expenses for transportation of tools.
>
> Such transportation expenses are ordinary and necessary expenses paid or incurred in carrying on his trade or business because they are occasioned primarily by the transportation of trade tools even if such expenses would otherwise be nondeductible commuting expenses in the absence of tool transportation."**

*Cited in *Sullivan*, CA 2.

**_Rice_ v. _Riddell_, 179 F. Supp. 576 (U.S.D.C. of Calif., 1959) is compatible with the rule as stated.

SUPREME COURT, U. S.

FILED

JUL 28 1969

JOHN F. DAVIS, CLERK

No. 281

In the Supreme Court of the United States

OCTOBER TERM, 1969

JOHN J. TYNE, JR., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
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In the Supreme Court of the United States

OCTOBER TERM, 1969

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 409 F. 2d 485. A prior opinion of the court of appeals (Pet. App. B) is reported at 385 F. 2d 40.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1969. (Pet. A1.) The petition for a writ of certiorari was filed on June 25, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

358-107—69

QUESTION PRESENTED

Whether, and to what extent, petitioner is entitled to a deduction for transportation expenses incurred while driving his car, with approximately 200 pounds of tools in it, between his residence and work sites.

STATUTES INVOLVED

Internal Revenue Code of 1954:

> SEC. 162. TRADE OR BUSINESS EXPENSES.
>
> (a) *In General.*—There shall be allowed as a deducton all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> * * * * *
>
> (2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and
>
> * * * * *
>
> SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.
>
> Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

STATEMENT

In 1967 the Tax Court, sustaining the Commissioner's determination, held that petitioner was not entitled to any deduction on his 1957, 1958 and 1960 returns for transportation expenses (assertedly $1,328.04, $1,881.66 and $940.43, respectively) incurred

in driving his automobile and truck between his residence and various work sites. Petitioner had claimed that the deductions were justified because he had transported essential work tools weighing approximately 200 pounds. (Pet. B1–B2.) In holding that the expenses involved were non-deductible commuting expenses, the Tax Court relied upon its prior decision in *Sullivan* v. *Commissioner*, 45 T.C. 217. Subsequently, the *Sullivan* decision was reversed by the Second Circuit, which adopted an allocation rule as appropriate in the circumstances and remanded the case to the Tax Court to determine the amount of the expenses allocable to the transportation of tools. *Sullivan* v. *Commissioner*, 368 F. 2d 1007.*

On petitioner's first appeal in this case, the Seventh Circuit reversed the Tax Court's decision and, adopting the allocation rule announced by the Second Circuit in *Sullivan*, remanded the case with instructions that the Commissioner "determine the allocation of the proportion of driving expenses which is a reasonable cost of doing business under Section 162" (385 F. 2d 40, 42). On remand, the Commissioner made a fifty percent allocation of expenses attributable to tool transportation, and the Tax Court entered its decision accordingly. (Pet. Apps. D and E.) On petitioner's appeal from that decision, the Seventh Circuit

*On remand in *Sullivan*, the Tax Court allocated one-third of the expenses to the transportation of the tools and found that the taxpayer would have driven to work even if it had not been necessary to transport the tools. On further appeal, the Second Circuit affirmed without opinion, and the taxpayer subsequently filed a petition for a writ of certiorari. *Sullivan* v. *Commissioner*, No. 195, October Term, 1969.

again reversed and remanded to the Tax Court for a determination whether petitioner met the test of Rev. Rul. 63-100, 1963-1 Cum. Bull. 34, that he would not have incurred the expenses "but for" the necessity of transporting the tools, so as to entitle him to a 100 percent deduction. (Pet. A1-A4.)

ARGUMENT

The decision below remanding the case to the Tax Court for determination on an alternate theory of deductibility does not deny petitioner any deduction to which he is entitled. There is no conflict of decision or other ground for further review.

1. If petitioner would have driven to work regardless of the need for transporting tools, his driving expenses were personal commuting expenses, and there would be no basis for any deduction. See *United States* v. *Correll*, 389 U.S. 299, 303. On the other hand, if the Tax Court on remand should find that petitioner would not have driven to work but for the necessity of carrying his tools (Rev. Rul. 63-100, 1963-1 Cum. Bull. 34), he may be entitled to a greater deduction for the transportation expenses. Absent such a finding, however, there is nothing to justify a larger deduction than the 50 percent allocation made by the Commissioner and adopted by the Tax Court. The decision may well be generous, for it is not clear that moving tools from home to job is any less a commuting expense than is the cost of moving the taxpayer himself.

2. The decision here is consistent with the other appellate decisions on the point. If the Tax Court

should determine on remand that petitioner would have driven to work in any event, and consequently rest its decision on an allocation determination, the disposition in this case is indistinguishable from *Sullivan* v. *Commissioner*, 368 F. 2d 1007 (C.A. 2). If the Tax Court finds that petitioner's expenses are within the "but for" test of Rev. Rul. 63–100, *supra*, the disposition here will be based on a theory which was factually resolved against the taxpayer in *Sullivan*.

Nor is there any conflict with *Crowther* v. *Commissioner*, 269 F. 2d 292 (C.A. 9). As the Ninth Circuit subsequently made clear in *Mathews* v. *Commissioner*, 310 F. 2d 98, the decision in *Crowther* turned on whether taxpayer was entitled to deduct "traveling expenses * * * while away from home," within the meaning of Section 162(a)(2) of the Internal Revenue Code of 1954. It is not contended here that petitioner incurred the transportation expenses "while away from home."

3. Petitioner also challenges the court of appeals' denial of his motion seeking relief from certain collections made by the Internal Revenue Service subsequent to the Tax Court's decision on remand. The Commissioner conceded in the court of appeals that part of the collections were unwarranted, and a refund has already been made. As the court of appeals observed, "Further abatement and refund will depend upon further decision by the tax court" on the second remand (Pet. App. C2). The propriety of the collection action thus provides no occasion for further review by this Court.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
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JOHNNIE M. WALTERS,
Assistant Attorney General.

MEYER ROTHWACKS,
Attorney.

JULY 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 281

JOHN J. TYNE, JR.

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Preliminary Statement

The judgment of the Court of Appeals was entered on April 2, 1969. Taxpayer's petition for a writ of certiorari was docketed on June 25, 1969. Respondent was served and actually received five copies of taxpayer's petition on the same June 25, 1969. Respondent had until July 1, 1969 to file a petition or cross-petition for certiorari, which he declined to do. Pursuant to Rule 24, ¶1 of the Rules of the Court, respondent had until July 25, 1969 to file a brief in opposition, which he also did not do. The Court may notice that respondent filed his brief in this matter after all deadlines spelled out in the Rules of the Court.

Argument

1. Respondent attempts on Page 2 of his brief to distort the first of the 3 questions presented by petitioner. Immediately, respondent indicates the legal chaos which exists in this area of law. No question is presented as regards a situation where taxpayer would not have used his vehicle but for the necessity of transporting tools; that question has consistently been held by the Second, Seventh and Ninth Circuits to give rise to 100% deductibility of the expenses involved. The first question presented by petitioner concerns a situation where it may be found that taxpayer *would* have driven to and from work had it not been necessary to transport his tools. Respondent chose not to petition for a writ of certiorari and he cannot now do by indirection what he previously chose not to do directly. He does, however, emphasize the grave need for this Court to hear the questions presented by petitioner.

2. Petitioner's questions 2 and 3 are completely avoided by respondent. No argument is presented by respondent. Respondent does state in ¶3 on Page 5 of his brief: "a refund has already been made". If this quoted statement is intended to be fully informative, we must report to this Court that it is not. Of the total seizure of $2,020.22, a partial refund was made after petitioner instituted proceedings for refund of the seizures. Of the seized amount, the refund made in May 1969 totaled $488.93. Respondent still retains the balance of the seizure in the amount of $1,531.29. We are grieved that respondent failed to state the matter fully. But more importantly, respondent, by not addressing himself to petitioner's Questions 2 and 3, emphasizes the grave need for this Court to hear the questions presented.

3. Respondent mis-states the matter when, in the parenthetic notation of the expenses involved at the bottom

of Page 2 of his brief, he uses the word "assertedly". There is nothing *assertedly* about the matter. These are the exact expenses to which all the random percentages have been applied, both by the Tax Court and by respondent as he admits on the bottom of Page 3 of his brief: "the Commissioner made a fifty percent allocation of expenses". The expenses used by the Commissioner were the precise amounts set forth which respondent now tries to conceal as *assertedly* on Page 2 but which he admits as accurate on Page 3 of his brief, in his computations to the Tax Court, and elsewhere.

4. Respondent highlights the importance of this case and urgent need for this Court to decide the issue when he creates his own new rule and baldly states:

> "If petitioner would have driven to work regardless of the need for transporting tools, his driving expenses were personal commuting expenses, and there would be no basis for any deduction."

Thus, in one stroke he attempts to overrule all decisions in point by the Second, Seventh and Ninth Circuit Courts of Appeal. In the same stroke he also re-writes Section 162 (a) of the Internal Revenue Code by announcing there shall NOT be allowed all the ordinary and necessary expenses paid or incurred in carrying on any trade or business.

In support of the new rule he created for this case, respondent cites *U. S.* v. *Correll,* 389 U. S. 299, 303 which most certainly is inapplicable to the case at bar. *Correll* concerned the deductibility of morning and noon meals of a travelling salesman. This Court, in *Correll,* ruled that the word *and* in the statute there involved really meant *and* because that was the word used by Congress in the statute. This Court thus ruled in *Correll* that the phrase "meals *and* lodging" was a conjunctive phrase because the conjunctive word *and* was used in the statute. *Correll* is very dam-

aging to respondent because it shows that the wording of the statute must be followed. This being so, it is clear that the word "ALL" in Section 162 (a) cannot be read to say "some" or "none" . . : for if the wording of a statute is determinative in one case, the wording of a different statute in a different case has also to be determinative. It is also clear that the meaning of the word "ALL" in Section 162 (a) must of necessity have the same meaning in Section 61 (a) of the Internal Revenue Code of 1954.

5. Respondent continues:

> "On the other hand, if the Tax Court on remand should find that petitioner would not have driven to work but for the necessity of carrying his tools (Rev. Rul. 63-100, 1963-1 Cum. Bull. 34), he may be entitled to a greater deduction for the transportation expenses. Absent such a finding, however, there is nothing to justify a larger deduction than the 50 percent allocation made by the Commissioner and adopted by the Tax Court. The decision may well be generous, for it is not clear that moving tools from home to job is any less a commuting expense than is the cost of moving the taxpayer himself."

The Seventh Circuit assigned the burden to the Commissioner to justify less than 100% of Tyne's expenses which, of course, respondent did not do. Respondent claims the matter is not clear to him and thus provides a pursuasive reason why the Court should hear this case.

Respondent relies on his etherial and consistently discredited Rev. Rul. 63-100 and in so doing greatly enhances the need for this cause to be heard and determined by this Court. Respondent states that petitioner "may" be entitled to a greater deduction. Thus we are permitted to tell this Court how respondent is using his discredited Rev. Rul. 63-100 in daily practice. Respondent construes

the first paragraph of his Ruling as spelling out "absolute necessity" of vehicular transportation of tools as a prerequisite to obtaining a deduction for the expenses involved. He also construes the second paragraph of his Ruling as spelling out "primary necessity" of vehicular transportation of tools as a prerequisite to obtaining a deduction for the expenses involved. Then respondent takes his position that if you prove "absolute necessity" you cannot have the deduction because "absolute necessity" of paragraph 1 is different than "primary necessity" of paragraph 2 of Rev. Rul. 63-100. Conversely, you cannot have a deduction if you prove "primary necessity" because you then have not proven "absolute necessity". Respondent takes his position that "absolute necessity" is not "primary necessity" and vice versa; that the 2 terms are mutually exclusive and that taxpayer must prove both necessities in order to get the deduction. While this may seem heavy handed, it at least gives meaning to respondent's otherwise ambiguous declaration that petitioner "may" be entitled to a greater deduction.

6. Respondent argues in Item 2 of his brief:

> "The decision here is consistent with the other appellate decisions on the point."

This, of course, is true insofar as the 3 Circuits allow 100% of taxpayer's driving expenses if the taxpayer would not have driven to work but for the necessity of bringing his trade tools with him. But it is not true when we come over to the first question presented by petitioner.

7. Respondent continues:

> "If the Tax Court should determine on remand that petitioner would have driven to work in any event, and consequently rest its decision on an allocation determination, the disposition in this case is indistinguishable from Sullivan v. Commissioner, 368 F. 2d, 1007 (C. A. 2)"

If this really were true, why then did respondent distinguish between the cases? Why was a random and unreasoned one-third of expenses allowed in *Sullivan*? Even if *Sullivan* could be defended by respondent on a basis of less than all the ordinary and necessary expenses, why then did respondent distinguish the instant case by picking a random and unreasoned 50% factor to apply against petitioner's remaining 80% of expenses?

Respondent again has demonstrated the legal chaos which he fosters. How shall the more than 2,000,000 men affected by this case prepare their annual income tax returns? Shall they be guided by the zero percent interpretation of Rev. Rul. 63-100, or by the one-third in *Sullivan*, or by the 50% (or 60%) in *Tyne*, or by the *ALL* in Section 162 (a) of the Internal Revenue Code of 1954, or by the 100% in *Crowther*?

8. The Crowther decision allows ALL (100%) of the expenses of transporting tools. Respondent mis-states his defeat in *Mathews* (which did not involve a question of transporting tools) and manufacturers a truly masterful fiction that *Crowther* turned on whether taxpayer was entitled to deduct "traveling expenses * * * while away from home". This fiction, of course, is not true. *Mathews* said nothing of the sort. The dictum referred to in *Mathews* v. *Commissioner*, 310 F.2d 98, reads:

> "We do not think that our decision in Crowther depended upon the fact that the taxpayer in that case was required to carry his tools into the woods with him."

This dictum (in a case involving no tool transportation) has been twisted completely out of shape by respondent and falsely "interpreted" by use of a magnificently executed non-sequitur by respondent to pretend that *Crowther* did not deal with transportation of tools.

Prentice Hall's authoritative American Federal Tax Reports states the matter clearly in its Headnote 3 in *Crowther*, 4 AFTR 2d 5295:

> "Deduction - Trade or Business Expenses - Transportation of tools
>
> Deduction allowed for costs of transportation of personal tools to log site by employee felling trees and cutting them into logs."

So also is it clear by reading *Crowther* v. *Commissioner*, 269 F. 2d 292, at:

> Page 298: In this case, there was the necessity of traveling back and forth to the "layout" * * * caused * * * by the necessity of carrying tools back and forth to be repaired.
>
> Page 299: The necessity of daily transporting his tools from his layout in the woods, to Fort Bragg, for the purpose of repair or replacement, appears important to us. This was a business necessity, rather than a personal necessity.
>
> Page 299: The operating expenses of the automobile and jeep were "ordinary and necessary expenses paid or incurred . . . in carrying on the trade or business of the taxpayer." We do not believe that they could be called "personal living or family expenses."

100% of Crowther's auto and jeep expenses were allowed to him and the Ninth Circuit rejected the Tax Court's finding that his expenses "are divisible into (1) personal expenses of 'commuting' to his work and (2) business expenses of *transporting tools and equipment used by him in his employment.*"

Conclusion

For all the foregoing reasons, petitioner respectfully prays this Court grant a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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August 1969